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MOTION FILED MAR 28 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION, *Petitioner,* v. HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU, and THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Respondents.*	PETITION FOR A WRIT OF CERTIORARI No. 742
TRI-CONTINENTAL FINANCIAL CORPORATION, *Petitioner,* v. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *Respondent.*	MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR OTHER APPROPRIATE WRIT Misc. No. 813

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTARY APPENDIX.

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March 28, 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,
v.
HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU,
and
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondents.

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PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTARY APPENDIX.

On March 23, 1960, some three weeks after the filing by Tri-Continental Financial Corporation ("Tri-Continental") of its petition and motion herein, the Court of Appeals for the Second Circuit took an extraordinary step in this case which vividly points up the need for review of its judgment by this Court.

By a vote of 3-2, the full bench of the Court of Appeals denied an "application for hearing *in banc*" made by one of its own members, Judge Charles E. Clark, for the purpose

of having the full court reconsider the panel decision of January 29[1] that the judgment of the District Court,[2] which the panel reversed, was appealable under 28 U. S. C. §1292(a)(1) (1958).

Judge Clark, joined by Judge Waterman who had dissented from the opinion and judgment of January 29, filed a nine-page opinion in which he, too, dissented from that earlier opinion of the court. "The matter", Judge Clark wrote,

> "is of such importance in our daily practice that it seems desirable now for me to point out the uncertainty of the ruling both for the present case and for the future. • • • [T]he confusion this ruling will make in our law is apparent; it is enhanced when we note the steady current of opposing decisions in other circuits and in states following the federal rules. • • • A diligent search has not uncovered any definite support for that holding in other circuits or in states following the federal rules."[3]

Judge Friendly, joined by Chief Judge Lumbard and by Judge Moore, who expressed no view on the merits but felt *in banc* reconsideration inappropriate, also filed an opinion in which he defended the propriety of the earlier opinion of January 29. In this opinion Judge Friendly endorsed Judge Clark's comment in *Federal Glass Co. v. Loshin*, 224 F. 2d 100, 101 (2d Cir. 1955) that

> "A resolution of these conflicts [on the question of appealability in cases of this type] must ultimately come from the Supreme Court."[4]

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[1] See Appendix B to Tri-Continental's Petition of February 29, 1960 (hereinafter "Petition"), pp. B-16-B-24.

[2] *United States* v. *New York, N. H. & H. R. R.*, 170 F. Supp. 562, Petition, Appendix A (S. D. N. Y. 1959).

[3] See Appendix hereto, denominated "Appendix E," pp. 1108, 1113, 1114.

[4] *Id.* at 1118.

Since SUPREME COURT RULE 23 (i) requires a petitioner for a writ of certiorari to append to his petition "a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed" and since the two new opinions in the Court of Appeals for the Second Circuit cast such important light on the question of appealability which Tri-Continental has presented to this Court for review, Tri-Continental prays leave to file those opinions, appended hereto, as Appendix E to its petition for a writ of certiorari and motion for leave to file petition for writ of mandamus or other appropriate writ of February 29, 1960.

Respectfully submitted,

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March 28, 1960.

APPENDIX E.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959.

March 23, 1960.

Docket No. 25879

HELENE GLENMORE *et al.*,

Plaintiffs-Appellants,

—v.—

JOHN I. AHERN *et al.*,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*, and
CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

On application for hearing *in banc.*

CLARK, *Circuit Judge* (dissenting):

In this case a panel majority has held, against strong dissent by Judge Waterman, that a trial judge's rejection of one theory of liability, leaving others pending, is the denial of an injunction sufficient to support an appeal and reversal for issuance of the injunction. *Glenmore* v. *Ahern*, 2 Cir., Jan. 29, 1960. Since this raises questions of the most serious nature, I asked all my brothers, as soon as I learned of the ruling, to consider it further *in banc*. While the vote

was divided, it was against such consideration here. The matter is of such importance in our daily practice that it seems desirable now for me to point out the uncertainty of the ruling both for the present case and for the future. I am not enamored of *in banc* proceedings; in the particular cases where we have tried them, they appear to have raised more questions than they have settled. But so long as we do order them at least occasionally, it would appear that a decision such as this on a continually recurring issue of practice, against so many strong precedents and reasons of policy, is one made to order for such procedure if any case is.

Naturally I am sorry that I could not express these convictions before or at least with the filing of the decision, as would have been possible had our custom of intramural warnings of the approach of overruling opinions been observed here. As it was, I acted at the earliest possible moment. My dissent appears to have had one unique consequence in that it has induced a counterdissent to it wherein my authority to take these steps seems to be questioned. I do not see how this can be pressed, since the statute authorizing *in banc* procedure, 28 U. S. C. §46(c), contains no such restriction and the leading case, *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U. S. 247, 250-277, continually stresses *judicial* as opposed to *party* initiative and quotes legislative history to support that conclusion. Further, I do believe the court gains standing by encouraging free and thorough canvassing of these issues without the deadening influence of constraining restrictions.

The decision was rendered in a stockholders' derivative action, which challenged as invalid without I. C. C. approval transactions between the New Haven Railroad and certain bankers to raise money on loan through the means of somewhat involved transfers of a large block of preferred stock.

The district court had held the transactions valid, but in the companion appeal of *United States* v. *The New York, New Haven & Hartford R. Co.* my brothers first ruled—at the behest of the United States on behalf of the Interstate Commerce Commission—that they were invalid. 2 Cir., Nov. 2, 1959. Later, however, they ruled that they lacked authority to pass on that issue, since appeal must go directly to the Supreme Court; and then in the same opinion a majority reversed the dismissal of Count 6 of the stockholders' complaint to issue an injunction substantially similar to the one they were holding beyond their authority in the action by the United States. This is the decision of January 29, 1960, cited above. Count 6, under the pleader's course of pleading different legal theories in separate counts,[1] alleged the invalidity of the transactions in issue for lack of I. C. C. authorization.[2] The judge dismissed this count in what he termed a final order, but my brothers aptly say: "The judgment plainly was not final even as to the transactions here challenged, since other theories of liability remained," and again "• • • even as to the transactions here challenged, other grounds for the grant of an injunction remained undetermined." Nevertheless they hold it "appealable as an interlocutory order refusing an injunction under §1292(a)(1)" of 28 U. S. C.

Under the settled federal rule that "claim" refers to the operative facts giving rise to an enforceable right, and not

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1 Now undesirable (as the event here again tends to show), but not actually forbidden. See Clark, Code Pleading 459-461, 462-464 (2d Ed. 1947); F. R. 10(b); *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976.

2 Of the ten counts left standing, numbers 5 and 7 are particularly interesting, since they are so precisely similar to 6, except that 5 relies on the Investment Companies Act, and 7 on the railroad charter, to show invalidity of the questioned transactions.

to legal theories, *Original Ballet Russe* v. *Ballet Theatre*, 2 Cir., 133 F. 2d 187, it is clear that here the claim refers to the money-raising transactions, the invalidity of which is asserted in this litigation. Hence the claim has not yet been fully passed upon; the judge has merely said in an interlocutory ruling that he will not accept one ground of asserted invalidity. See the opinion below, D. C. S. D. N. Y., 170 F. Supp. 562, 567. This may be useful in illustrating his approach to the parties and warning them of what they must do to persuade. Beyond this it is indeed difficult to see what it can mean by way of definitive action. For it is the judge's decision on the transactions themselves which is important; his rationale is not decisive. When the time for final action comes he may use another rationale or vary his present one or disclose none at all; whatever he has said he will be in error only if his decision is incorrect. A right decision for the wrong reason is always acceptable. This is so elemental that its partial challenge here is strange. Just what has been determined either by the ruling below or the reversal here? The answer is nothing. After a full hearing below the judge may revert to his original analysis or adopt any other which he thinks may lend persuasive force to his adjudication. So the judge has not yet denied an injunction, and it is improper for us to act as though he had. Of course the parties could have asked the judge for immediate more definitive action by simply bringing on the issue of the award of an injunction *pendente lite*, instead of the present proceedings seeking only a partial summary judgment. But the difference between a mere "step" in controlling the litigation before the trial court and definitive adjudication is a naturally recurring one, often explained and defined, as in *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 184; *City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U. S. 254. The conced-

edly interlocutory nature of the ruling here seems in fact more obvious than in the cases just cited.[3]

The basis for the holding here according some more definitive character to the judge's present action is based upon the first opinion in *Federal Glass Co.* v. *Loshin*, 2 Cir., 217 F. 2d 936, rendered by a divided court.[4] It should be noted that there Judge Smith below had spoken rather decisively against the grant of an injunction, so that there was more support for the substance of the decision than here; but the language of the opinion spoke so decisively of wide appealability as not to carry assent; and two active circuit judges expressed their nonconcurrence in this approach when the case appeared later. *Federal Glass Co.* v. *Loshin*, 2 Cir., 224 F. 2d 100. So even on the authorities relied on, the

3 It is necessary to stress the judge's undoubted power to make a definitive ruling when he so chooses because question is suggested as to whether he must state all the grounds for decision or can raise doubts of irreparable damage and so on. Of course he is not so hampered and the issue is or should not be on rationale, but as to what, if anything, he has decided. Once his intent is clear, then it is a question of applying the normal principles of law to his action. Naturally the issue here is not the sole one possible; thus there may be a serious question whether a trial judge has granted merely a temporary restraining order which is not appealable or a temporary injunction which is. See, e.g., *Connell* v. *Dulien Steel Products, Inc.*, 5 Cir., 240 F. 2d 414, noted in 71 Harv. L. Rev. 550; *Madison Shipping Corp.* v. *National Maritime Union*, 3 Cir., 273 F. 2d 955.

4 Also cited is *Telechron, Inc.* v. *Parissi*, 2 Cir., 197 F. 2d 757, which quite clearly is not apposite; for that dealt with two separate claims, a federal claim for patent infringement and a common-law or state claim for disclosure of confidential relations. So far apart had our court considered these claims that it would not even allow the state claim to be asserted in a federal court, see, e.g., *Musher Foundation* v. *Alba Trading Co.*, 2 Cir., 127 F. 2d 9; and it took a new statute granting federal jurisdiction over both these "claims," 28 U. S. C. §1338(b), and the overruling in *Parissi* of a first restrictive decision to get this second claim even recognized federalwise. This history is set forth in my dissent in the overruled case, *Kleinman* v. *Betty Dain Creations*, 2 Cir., 189 F. 2d 546, 549-555. So dismissal of the separate nonpatent claim, with the finding of finality under F. R. 54(b), was obviously denial of an injunction as to it.

count would seem to have been far from decisive, as the two opinions herein tend to assume.[5]

Actually, however, there have been more lately a whole series of cases in this court, not noticed in the original majority opinion, which rather completely establish that the merely interlocutory rulings of an equity judge advancing the case on his calendar may not properly be considered either the grant or denial of an injunction. Thus see *Greenstein* v. *National Skirt & Sportswear Ass'n*, 2 Cir., Jan. 28, 1960; *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 2 Cir., 269 F. 2d 618; *Marco* v. *Dulles*, 2 Cir., 268 F. 2d 192; *Fleischer* v. *Phillips*, 2 Cir., 264 F. 2d 515, certiorari denied *Fleischer* v. *Benjamin*, 359 U. S. 1002. The two most recent (and unanimous) cases just cited are instructive in holding that an order granting a stay *pending arbitration* in an action seeking injunction did nothing more—in the words of Judge Hand in the *Armstrong-Norwalk* case, *supra*, 2 Cir., 269 F. 2d 618, 621—"than forbid the plaintiff from pressing its action pending the arbitration," which was "only a step in the action itself." And the other two cases dealt with orders refusing to disqualify attorneys in injunctive actions. The last case cited—the first of this group in point of time—refers to the wealth of precedents from other circuits.

Additionally a further substantial line of recent cases are definitely at variance with this result; they are cases where we have dismissed appeals for lack of final judgment which should have been held appealable as rulings on injunctions, had my brothers' present views been then ac-

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5 I doubt if *Raylite Elec. Corp.* v. *Noma Elec. Corp.*, 2 Cir., 170 F. 2d 914, is to be considered present authority, since admittedly it was decided at a date before extensive consideration of the issue had been had and in the *Loshin* case itself, its reconsideration was thought appropriate. And Judge Swan, who wrote the opinion, has shown himself amenable to majority view, as in *Marco* v. *Dulles*, 2 Cir., 268 F. 2d 192, and *Goldlawr, Inc.* v. *Heiman*, 2 Cir., 273 F. 2d 729.

cepted. They include *Goldlawr, Inc.* v. *Heiman*, 2 Cir., 273 F. 2d 729; *John & Sal's Automotive Service* v. *Jones Beach State Parkway Authority*, 2 Cir., 267 F. 2d 862; *Gauvreau* v. *United States Pictures, Inc.*, 2 Cir., 267 F. 2d 861; *Schwartz v. Eaton*, 2 Cir., 264 F. 2d 195; *Colt Beverage Corp.* v. *Canada Dry Ginger Ale*, 2 Cir., 243 F. 2d 795. Since this is a question of jurisdiction, I think we must be as alert to sustain our jurisdiction as to deny it in a proper case; the failure of counsel to bring up the argument is not enough to deny it. Hence the confusion this ruling will make in our law is apparent; it is enhanced when we note the steady current of opposing decisions in other circuits and in states following the federal rules.

The leading case is probably Judge Hastie's notable and often-cited decision in *Morgenstern Chemical Co.* v. *Schering Corp.*, 3 Cir., 181 F. 2d 160, the rationale of which has never been answered. See in accord *Albert* v. *School Dist. of Pittsburgh*, 3 Cir., 181 F. 2d 690, 691; *American Airlines* v. *Forman*, 3 Cir., 204 F. 2d 230; *District 65, Distributive, Processing and Office Workers Union of New York and New Jersey* v. *McKague*, 3 Cir., 216 F. 2d 153; *Wallace Products, Inc.* v. *Falco Products, Inc.*, 3 Cir., 242 F. 2d 958; *Division 689, Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees of America, A.F.L.* v. *Capital Transit Co.*, D. C. Cir., 227 F. 2d 19; *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, D. C. Cir., 232 F. 2d 366, 369; *Spruill* v. *Cage*, 6 Cir., 262 F. 2d 355; *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 7 Cir., 187 F. 2d 65, certiorari granted 341 U. S. 930, dismissed by stipulation 342 U. S. 802; *Brandt* v. *Renfield Importers, Ltd.*, 8 Cir., 269 F. 2d 14; *Baltimore Contractors* v. *Bodinger, supra*, 348 U. S. 176; *City of Morgantown, W. Va.* v. *Royal Ins. Co., supra*, 337 U. S. 254; *Maybury* v. *City of Seattle, Wash.*, 336 P. 2d 878, 881; *Settem* v. *Etter*, 236 Minn. 514, 53 N. W. 2d 467; *Smith* v.

Hamilton, 70 Nev. 212, 265 P. 2d 214; *Bell* v. *Davis*, Tex. Civ. App., 287 S. W. 2d 733; *F. & T. Development Co.* v. *Morris*, Tex. Civ. App., 248 S. W. 2d 233. Some of these decisions specifically criticize the first *Loshin* case, e.g., the *Division 689* and *Maybury* cases, as do also the text writers, 3 Barron & Holtzoff, Federal Practice & Procedure §§1241, 1242 (Wright Ed.); 6 Moore's Federal Practice 49-51, 2321 (2d Ed. 1953).[6] A diligent search has not uncovered any definite support for that holding in other circuits[7] or in states following the federal rules. Nor is it possible, in view of both the careful analysis and the specific holdings of these precedents, to push them aside on any attempted fragmentation of the issue of interlocutory appeals and the statute, 28 U. S. C. §1292(a)(1). It is regrettable that our recent return to the Union is now to be repudiated without discussion of the weight of policy and precedent against that course.

The decisions indicate that nowhere else in the country is the issue of piecemeal appeals in such acute condition as here. Presumably it is due somewhat to the permeation of local practice, for New York is notorious for interlocutory appeals—a fact which is said to lead lawyers to choose the federal courts where available. Harper & Atwood, Civil Practice in the Federal Courts (Practising Law Institute, July 1956 Ed.) 1, 2. What we are doing is to invite a plethora of such appeals. Every motion day has numerous

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6 This seems generally true of the law review comments on the case. 4 Buffalo L. Rev. 355; 68 Harv. L. Rev. 1278; 39 Minn. L. Rev. 921; 103 U. of Pa. L. Rev. 816; 7 Stanford L. Rev. 549.

7 Possibly it has support in a single case, *International Forwarding Co.* v. *Brewer*, 5 Cir., 181 F. 2d 49, although the discussion (at an early date when only the *Raylite* opinion was available) is so summary that little can be deduced from it. It seems also partially supported in Judge Danaher's dissent in *Division 689, Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees of America, A. F. L.* v. *Capital Transit Co.*, D. C. Cir., 227 F. 2d 19, cited *supra*.

ones involving such questions as denials of leave to amend pleadings or refusals to quash service;[8] while most of these are quite properly (if somewhat inconsistently) denied, yet the burden remains. And more than occasionally an utterly inconsistent decision appears.[9] No wonder counsel are confused. Judge Waterman's unanswered dissent in this case states the correct course, and it is my earnest hope that it may be followed hereafter.

Of course assumption of nonexistent jurisdiction perhaps often does not do much harm except to add substantially to the burdens of an overburdened appellate court and to invite other such appeals. Thus attempted affirmance may perhaps amount to hardly more than an interim accolade to the trial judge. But often it may raise much more serious questions. Here it would seem we have such a case. For the court has assumed to issue a rather far-reaching injunction affecting substantial financial interests in a case where

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8 Thus three of such abortive appeals were dismissed at the last motion session in which I participated, together with my brothers Moore and Friendly.

9 An example is *Goldlawr, Inc.* v. *Heiman*, *supra*, 2 Cir., 273 F. 2d 729, where after the court had denied its jurisdiction for lack of an appealable final judgment, Dec. 29, 1959, it proceeded on Jan. 18, 1960, to vacate the very judgment over which it had held it had no power. This is contrary to the settled view that the court must always note the absence of an appealable order whenever shown, and must cease further activity even though the parties are prepared to consent or waive the objection. See the many cases cited in the text of this dissent between footnotes 5 and 6. The cases cited in the second *Goldlawr* opinion appear not to be in point. *Phillips* v. *United States*, 312 U. S. 246, and *Rorick* v. *Board of Comm'rs of Everglades Drainage Dist.*, 307 U. S. 208, concerned only the proper routing for purposes of review of district court judgments which were actually quite final, i.e., the issue presented in the companion case herewith decided, namely, *United States* v. *The New York, New Haven & Hartford R. Co.* And *In re Cook's Motors*, 1 Cir., 142 F. 2d 369, a case concededly of "peculiar circumstances" where trial admonition was superfluous—one not heretofore cited as defining appellate power—actually involved the settlement of claims against a bankruptcy estate under the admittedly broad federal jurisdiction in bankruptcy.

it lacks jurisdiction. It seems to me that the injunction must be held invalid; hence its potentialities of damage are extensive. A rehearing *in banc* would have afforded opportunity to settle some of these issues now left blind.

I am authorized to state that Judge Waterman concurs in this opinion.

FRIENDLY, *Circuit Judge*:

To Chief Judge Lumbard and me, the four opinions already written would have seemed sufficient, even for the tangled problems in this and its companion case, *United States* v. *New York, New Haven & Hartford RR. Co., et al.*, November 2, 1959: November 13, 1959; majority and concurring-dissenting opinions January 29, 1960. This is particularly true since the cases are now before the Supreme Court, which can review both the many substantive and procedural questions on which this Court was unanimous and the single procedural question, the appealability under §1292(a)(1) of the refusal of the injunction in the New Haven stockholders' suit, as to which Judge Waterman dissented. Now we have a fifth opinion, on that point. We feel obliged to note that the course which has brought this to us would mean that any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter, a practice which seems to us of dubious policy especially since, if the issue is of real importance, further opportunities for expression will assuredly occur.[1] We would not have responded but for the assertions, unwarranted as we think,

1 Despite our brother Clark's expressed belief "that in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby," *Dunbar* v. *Henry DuBois' Sons Co., Inc.*, decided February 10, 1960, p. 722, we would favor what he characterizes as a "custom of intramural warnings of the approach of overruling opinions" so as to permit a request for an *en banc* before judgment is rendered. There was no occasion for such

that our opinion left Judge Waterman's dissent unanswered and that we overlooked a series of cases in this Court which apparently are claimed to have overruled *sub silentio*, or at least to have undermined, the authority on which we relied.

The issue is the interpretation of the word "refusing" in 28 U. S. C. §1292(a)(1) which, so far as here material, gives the courts of appeals jurisdiction over appeals from "Interlocutory orders of the district courts * * * refusing * * * injunctions."

The first problem to arise in this regard was whether denial of a motion by a plaintiff for summary judgment in a suit for an injunction on the ground that there was a triable issue of fact was an order "refusing" an injunction. In *Raylite Electric Corp.* v. *Noma Electric Corp.*, 170 F. 2d 914, 915 (2d Cir. 1948), a unanimous Court (Judges Learned Hand, Swan and Chase) held that it was. Two years later, in *International Forwarding Co.* v. *Brewer*, 181 F. 2d 49 (1950), the Fifth Circuit held likewise in a case where a plaintiff's motion for judgment on the pleadings in an injunction action had been denied. However, on the very same day, the Third Circuit, in *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160 (1950), reached a result opposite to ours in *Raylite*. In view of the able opinion there

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a warning here since neither the majority nor, as we read Judge Waterman's opinion, the dissenter, thought we were doing this.

Although the vote against the *en banc* renders the point moot, we do entertain serious doubts whether, in the absence of any court rule or practice, an *en banc* may be ordered at the request of a judge not participating in the decision, made after judgment was rendered (although unavoidably so), when no request for this has been made by a party. We do not read the remark in *Western Pacific RR. Case*, 345 U. S. 247, 262 (1953), as to the court's power "to initiate en banc hearings *sua sponte*," as independent of the Supreme Court's admonition, pp. 260-61, "It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice—whatever it may be—whereby the court convenes itself en banc." This seems peculiarly applicable after judgment has been rendered and further appellate proceedings are about to be taken.

rendered by Judge Hastie, this Court reconsidered the question on a motion to dismiss the appeal in *Federal Glass Co.* v. *Loshin*, 217 F. 2d 936 (2d Cir. 1954). The majority, Judges Learned Hand and Frank, adhered to the result reached in *Raylite;* Judge Clark dissented. No request was made for an *en banc*. Despite what was said when the *Loshin* case came before the Court on the merits, 224 F. 2d 100 (1950), the issue was evidently deemed settled for this Circuit. For Judge Clark's opinion in the second *Loshin* case stated, at page 101, that "A resolution of these conflicts must ultimately come from the Supreme Court." [2] Neither the circumstance, not especially surprising, that the Third Circuit has followed its own *Morgenstern* decision nor the fact that this has attracted some following,[3] seemed to us to warrant reexamination of a matter that had already re-

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2 Of the judges in this Circuit who had considered the problem, four, Judges Learned Hand, Swan, Chase and Frank, had held that an order denying a motion for summary judgment by a plaintiff in an action for an injunction was appealable under §1292(a)(1); two, Judges Clark and Medina, thought it was not.

3 Its following, at least in the Federal courts, is nothing like so great as the long list of citations would indicate. In *Division 689* v. *Capital Transit Co.*, 227 F. 2d 19 (D. C. Cir. 1955), while both majority and minority referred to *Morgenstern*, the decision was that a motion to compel arbitration "is not an application for injunctive relief." This likewise was the holding in *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, 232 F. 2d 366 (D. C. Cir. 1956), which did not mention *Morgenstern*. *Spruill* v. *Cage*, 262 F. 2d 355 (6th Cir. 1958), held denial of a defendant's motion, styled as one for summary judgment but held to be rather a motion to dismiss, in an action for a declaration of rights, was not a final decision appealable under §1291; the opinion does not mention §1292(a)(1); *Morgenstern* was included in a string citation along with 2d Circuit authority. *Brandt* v. *Renfield Importers, Ltd.*, 269 F. 2d 14 (8th Cir. 1959), involved the same dismissal-of-one-of-multiple-defendants problem as the 2d Circuit cases discussed in our opinion, pp. 697-98; no reference was made to *Morgenstern*. This leaves *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (7th Cir. 1950), *cert. dismissed per stipulation*, 342 U. S. 802 (1951). We have not examined the state cases, since the entire statutory and decisional background would have to be thoroughly explored and we do not deem this warranted on a question of federal appellate jurisdiction.

ceived such thorough consideration from distinguished members of this Court,—particularly since the consequences predicted in the dissent in the first *Loshin* case had in no way materialized.[4]

Moreover, as pointed out in our opinion, the issue here was not that on which this Court and the Third Circuit have disagreed but one where we deem the case for appealability to be stronger. Is a district judge's dismissal of a count of a complaint for an injunction resting on a claim of violation of a Federal statute separate from any other claim to be denied recognition as a "refusal" of an injunction because some day the same or another judge might or might not grant an injunction on another count raising wholly distinct legal questions? To us a negative answer seems obvious; we think this would have been clear to everyone if the stockholders' suit had been all that stood between the New Haven and the $10,000,000 expenditure sought to be prevented and plaintiffs had pressed the allegation of Interstate Commerce Act violation as the only one sufficiently strong to afford a prospect of temporary relief. Indeed, we gather our brother Clark would agree that an order denying such a temporary injunction would have been appealable under §1292(a)(1). But, as pointed out by Judge Frank in *Federal Glass Co.* v. *Loshin*, 217 F. 2d at 938, a rule differentiating as to appealability between temporary and final injunctions would be "sheer ritualism."[5]

It is not surprising, therefore, that the differences of opinion in this Circuit as to appealability of the denial of summary judgment in an action for an injunction had not

4 Neither Chief Judge Lumbard nor I recalls a single appeal of this sort at the present Term.

5 We would suppose also that denial of a temporary injunction for want of sufficient showing of irreparable injury would be appealable, even if the judge gave plaintiff leave to renew on a more adequate showing, although it could be argued there at least as forcefully as here that the judge had not yet "refused" an injunction.

previously spilled over to the problem here presented. In *Telechron, Inc.* v. *Parissi*, 197 F. 2d 757 (2d Cir. 1952), a unanimous court (Judges Swan, Clark and Frank) upheld the appealability of an order excising unfair-competition language from a complaint for an injunction which also alleged a federal claim.[6] We are now told this decision is not apposite; but the asserted reason, that the excised claim was far apart from the one remaining, seems unrelated to the issue. Surely we are not to read §1292(a)(1) as if it said "refusing an injunction, unless some ground for injunction remains, unless that ground is far apart."

Neither the persuasiveness nor the authority of the decisions in *Loshin* and *Telechron* is in any way challenged by the four cases which are cited as establishing that merely interlocutory rulings of an equity judge advancing a case on his calendar may not properly be considered as either the grant or the denial of an injunction. We are in full accord with this proposition, but its very statement suffices to show how far it and the cases relied on are from the issue here. Three elements are required for appealability under §1292(a)(1) as here applied: (1) The order must be "interlocutory"; (2) it must "refuse"; and (3) what is refused must be an "injunction." Our question, like *Raylite*, *Loshin* and *Telechron*, related to the second element; the cases cited concerned the third. *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 269 F. 2d 618 (2d Cir. 1959) and *Greenstein* v. *National Shirt & Sportswear Assn.*, 2d Cir., January 28, 1960, applied the rule, laid down by the Supreme Court in *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955), that an order granting or denying a stay of an action pending arbitration would be deemed an "injunction" only if the action sought to be stayed would

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6. A footnote (p. 759) cites "* * * *Raylite Electric Corp.* v. *Noma Electric Corp.*, 2 Cir. 170 F. 2d 914, 915. Cf. *Morgenstern Chemical Corp.* v. *Schering Corp.*, 3 Cir., 181 F. 2d 100."

have been an action at law before the fusion of law and equity. *Fleischer* v. *Phillips*, 264 F. 2d 515 (2d Cir. 1959), *cert. denied*, 359 U. S. 1002 (1959), followed in *Marco* v. *Dulles*, 268 F. 2d 192 (2d Cir. 1959), related to orders refusing to disqualify an attorney. The important question discussed and decided was whether the orders were within the class appealable as final under 28 U. S. C. §1291 pursuant to *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). So far as concerns §1292(a)(1), the ruling was merely that (p. 156) "The real and only bite to each motion is the attempt to secure the exclusion of the lawyers from the case; and once disqualification is obtained, all else is superfluous. Hence the prayers for injunctive relief add nothing to the orders denying the motions and render neither of them automatically appealable under §1292(a)(1)." In other words, an "injunction" had not been refused.[7]

We do not assert our reading of §1292(a)(1) is the only possible one. However, we think this comports best not only with the language of the statute, but also with its reason and its history. Orders refusing injunctions are important orders—important not only to the litigants but often, as here, to the public. The need for prompt review arises from the very nature of an injunction, a remedy whose grant or refusal may result in an injury beyond possibility of repair. Congress recognized this when it subjected to review not only interlocutory orders "grant-

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7 Judge Clark also cites the cases, fully considered in our original opinion (pp. 697-98), where the Court has dismissed appeals that were argued to be properly before it as from final judgments under 28 U. S. C. §1291 and no contention was made with respect to appealability under 28 U. S. C. §1292(a)(1). Apart from other factors distinguishing most of these cases, it has been clear since Chief Justice Marshall's statement in *United States* v. *More*, 7 U. S. (3 Cranch) 159, 172 (1805), that courts do not consider themselves bound by the exercise of jurisdiction where "no question was made" and the issue "passed *sub silentio*,"—*a fortiori* by the failure to exercise it.

ing" or "refusing" injunctions but orders "continuing" or "modifying" them. To say that nothing was determined by Judge McGohey's order denying the stockholder's claim of Interstate Commerce Act violation seems to us legal theorizing unrelated to the facts. To be sure, the District Judge might have required the stockholders to present all their counts relating to the challenged transaction at one time but, for entirely sufficient reasons, he did not do so. We assure our brother Clark that, having long practiced in New York, we have no desire to see 28 U. S. C. §1292 modified, either by legislation or by interpretation, to parallel the provisions as to appeal from non-final orders contained in §609 of the New York Civil Practice Act—or to come near that. But §1292 is as much a part of the Judicial Code as §1291; the provision, now in §1292(a)(1), with which we are here concerned, was enacted in 1895, 28 Stat. 666, because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions" "had not been adequately considered" in the Evarts Act of 1891, 26 Stat. 826, Frankfurter and Landis, *The Business of the Supreme Court*, 108-09; after limiting the section to the grant or continuing of an injunction in 1900, 31 Stat. 660, Congress restored its former breadth in §129 of the Judicial Code of 1911, 36 Stat. 1134; and the need for still further expansion of appeals from interlocutory orders was demonstrated by the enactment of §1292 (b) in 1958, 72 Stat. 1770. It is not for us to put personal predilections on appealability above the Congressional will.[8]

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8 We see no occasion to discuss our brother Clark's observations in footnote 9 with respect to the unanimous action taken on January 18, 1960, in *Goldlawr* v. *Heiman*, 273 F. 2d 729, except to say that we are unable to follow the distinction of the Supreme Court cases there cited on the ground that they related to final judgments, since the defect in them as in *Goldlawr* was lack of appellate jurisdiction. We therefore cannot agree that an appellate court lacks power to preserve the substantial rights of the parties when an appeal has been taken to the wrong court by excusable error.

Chief Judge Lumbard joins in this opinion. Judge Moore, not having participated in the decision, deems it inappropriate that he comment as to the merits; however, he joins us in considering that an *en banc* should not have been granted here and also in regretting inauguration of a practice of writing opinions with respect to an *en banc* vote.